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In The

Supreme Court of the United States

LAUREN ANZALONE and
JAMES PURCELL,

Petitioners,

vs.

RAYMOND O'CONNELL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a state actor intending to chill the speech of a private citizen be relieved of liability because the citizen was not "actually chilled"?

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Lauren Anzalone and James Purcell, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on November 26, 2002, and was not published. It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut upon which the Court of Appeals based its ruling was rendered on October 3, 2001. It was not published. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on November 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This is a very simple case. The petitioners were community activists in the Town of Stratford, Connecticut. On August 1, 2000, they, together with others, filed a petition with the Town of Stratford's clerk requesting a recall election for the members of the Stratford Board of Education. The petitioners contended in the petition that the board had concealed "illegal and unethical behavior on the part[ ] of the superintendent." The respondent, Raymond O'Connell, the school superintendent, caused a letter to be sent to the petitioners threatening legal action if the petition was not retracted. The petitioners did not retract their petition, and they testified at their depositions that the superintendent's letter did not change their behavior. Neither did the letter cause them to become more guarded in their comments about the superintendent.

The respondent had his lawyer send the following letter to the petitioners and others:

> Dear Sir/Madam:
>
> Please be advised that I represent Raymond O'Connell, who, as you know, is superintendent of schools in the town of Stratford.
>
> Under date of August 1, 2000 you filed a petition request with the Stratford town clerk in which you stated in writing that each member of the Board of Education concealed from investigation and condoned "illegal and unethical behavior on the part(s) of the superintendent . . . "
>
> Your statement that Mr. O'Connell engaged in illegal and unethical behavior is totally false and untrue, is calculated to injure Mr. O'Connell in his profession, and is libelous.
>
> Unless the libelous charge in retracted in as public a manner as that in which it was made, within ten days from date hereof, legal action will be instituted for damages.

The petitioners testified at their depositions that notwithstanding this letter, their behavior did not change.

The trial court granted the respondent's motion for summary judgment, concluding, in part, that the facts in this case did not support a conclusion that the petitioners' First Amendment rights had been injured in fact. It is from that ruling that the petitioners appealed to the United States Court of Appeals for the Second Circuit. The Appellate Court held that the petitioners failed to demonstrate that they suffered "some actual, non-speculative chilling effect." The petitioners seek review of this holding insofar as there is a split in the circuits about whether such a requirement exists to sustain an action arising under 42 U.S.C. § 1983.

This case presents facts identical to those presented to this Court by way of a petition for certiorari in the case of *Lydia Colombo v. Raymond O'Connell*, 02-1156, received by this Court on February 5, 2003.

REASONS FOR GRANTING THE WRIT

I. There Is A Spilt In The Circuits On Whether A Plaintiff Must Sustain An "Actual Chill" In Order To Prevail In An Action Alleging A First Amendment Violation Of The Right To Freedom Of Speech

A. A Majority Of Circuits Hold That The Likelihood Of Chilling "A Person Of Ordinary Firmness" Satisfies The Chill Requirement

There are three elements to a claim for chilling a person's First Amendment rights. A plaintiff must prove: (1) that she has an interest protected by the First Amendment; (2) that the defendant's actions were motivated or substantially caused by her exercise of that right; and (3) that the defendant's actions effectively chilled the exercise of her First Amendment right. *Curley v. Village of Suffern*, 268 F.3d 65 (2d Cir. 2001); *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998).

These elements do not differ among the circuits; however, there is substantial disagreement among the circuits on the meaning of the chill requirement. The Second Circuit's holding that actual chill is required is the minority view of those circuits having considered the issue. *Sullivan v. Carrick*, 880 F.2d 1, 4 (1st Cir. 1989) ("must allege that . . . speech was in fact chilled or intimidated").

A majority of circuits take a different view, requiring only that a tortfeasor's acts be such as to chill "a person of ordinary firmness." *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998); *Crawford-el v. Britten*, 93 F.3d 813, 826 (D.C. Cir. 1996) (en banc), rev'd on other grounds, 523 U.S. 574 (1998); *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000); *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999).

As the District of Columbia Appellate Court has observed, "it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Crawford-el*, 93 F.3d at 826; see also *Mendocino*, 192 F.3d at 1300.

II. The "Actual Chill" Requirement Serves To Reward A Tortfeasor For Failing In His Unlawful Purposes

There is no principled reason why a state actor who seeks to chill a person in the exercise of their First Amendment right should be exempted from liability because he failed to accomplish his unlawful objective. Such reasoning would, in the criminal context, exempt a man who attempts to commit murder from criminal responsibility merely because he failed to achieve his unlawful end. Why should a state actor who strikes at a person exercising a core and fundamental Constitutional value benefit because of his failure?

Criminal jurisprudence punishes defendants who, "but for" some fortuitous factor, would have been guilty of some crime. "Factual impossibility" denotes conduct where the objective is proscribed by the criminal law, but a

circumstance unknown to the actor prevents him from bringing it about. See W. LaFave & A. Scott, Handbook on Criminal Law 438-45 (2d ed. 1972). In this case, the defendant-appellee seeks the benefit of a circumstance unknown to him, and one clearly not foreseen by him. When criticized by a citizen, he writes a letter designed to chill. The very purpose of the letter is to chill. Because the letter missed its mark, he now benefits. It makes no sense. The fortuity in this case is the fact that the defendant-appellee chose particularly thick-skinned targets. It would be paradoxical to relieve him from liability because he failed to accomplish his objective.

III. A Majority Of Circuits Avoid Rewarding A Tortfeasor For Failure And Avoid Injustice By Following An Objective Standard Requiring Something Less Than "Actual Chill"

The Sixth's Circuit standard for determining whether speech is chilled avoids the pitfall of state actor's benefitting from the failure of his unlawful intent.

> In order to prove a claim for retaliation, a plaintiff must establish the following elements: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that ***would likely chill a person*** of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Bloch v. Ribar, 156 F.3d 673, 679 (6th Cir. 1998) (emphasis added).

The difference between conduct that "would likely chill a person" under the *Ribar* standard and conduct that "actual chills" under *Davis* is significant and real. The *Davis* test unwittingly and ironically transforms the "chill" requirement into an entirely subjective standard, the very sort of standard explicitly rejected by the United States Supreme Court in *Laird v. Tatum,* 408 U.S. 1, 13-14. It also unintentionally permits a state actor to defend successfully a lawsuit merely because of the effect of his conduct. Put another way, even the most appalling behavior by a state actor will yield summary judgment if the defendant is either thick-skinned enough, or perhaps too daft, to be bothered by the conduct.

This cannot be what the Supreme Court had in mind when it discussed the chill requirement. First, the *Laird* decision did not address the merits of the appellants' argument in this case. All that is required in *Laird* is "a claim of specific present objective harm or a threat of specific future harm." *Laird*, 92. S.Ct. 2326. The Court ruled that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.' *United Public Workers of America (C.I.O) v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947)". *Id.* The plaintiff in the *Laird* case sought a declaratory judgment and brought a claim for injunctive relief to prevent surveillance of lawful and peaceful civilian political activity. It was not a claim for damages. The Supreme Court's language about subjective chill did not address the merits of claim presented in this case. The doctrinal concerns about rendering prospective advisory opinions are entirely absent in this case.

The *Ribar* standard avoids the infirmities of a strictly subjective test. It imports a sense of objective reasonableness into the law, thus shielding state actors from frivolous suits by those whose sensibilities are perhaps too dear in a republic embracing robust debate. It also avoids the pitfall of permitting a defendant to benefit from his own failure. Whether conceptualized as a strict objective standard or a subjective/objective test, *Ribar* permits the First Amendment to have real meaning in the context of a claim arising under 42 U.S.C. § 1983 by permitting jurors to make reasoned decisions about public officials who abuse their positions of authority and attempt to stifle criticism.

IV. The "Actual Chill" Analysis Is Really A Question Of Damages

Cases arising under 42 U.S.C. § 1983 seek to vindicate the rights of ordinary people whose federal rights have been violated by state actors. Our case law makes clear that such suits can succeed even if only nominal damages are awarded. Thus, in the Circuit, a person prevailing in a civil rights action, but receiving only nominal damages, can still obtain punitive damages and attorney's fees under 42 U.S.C. § 1983. Implicit in these holdings is a recognition that a person can prevail in a civil rights suit without proving actual damages. There is no principled reason why First Amendment cases should be treated differently.

Actual damages are never presumed merely from the fact of a constitutional violation. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). Thus, in cases in which a plaintiff prevails but a jury concludes that there were no compensatory damages, a plaintiff is

entitled to at least $1.00 in nominal damages. *Robinson v. Cattaraugus County,* 147 F.3d 153 (2d Cir. 1998). A verdict of zero is not permitted if a plaintiff succeeds in proving violation of his rights. *Gibeau v. Nellis*, 18 F.3d 107 (2d Cir. 1994). Punitive damages may be awarded in cases in which no compensatory damages have been awarded. *King v. Macri*, 993 F.2d 294, 297-98 (2d Cir. 1993); *Robinson v. Cattaraugus County*, 147 F.3d 153, 161 (2d Cir. 1998); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996).

Similarly, attorney's fees may be awarded to a plaintiff who obtains only nominal damages, and who fails to prove actual damages. *Carroll v. Blinken*, 105 F.3d 79 (2d Cir. 1997) (minimal success warrants substantial reduction in fees); *McCardle v. Haddad*, 131 F.3d 43 (2d Cir. 997) (not an abuse of Court's discretion to award a mere 33 cents in fees on a nominal damage award). Although the United States Supreme Court has made clear that attorney's fees awards in such cases may be granted, the Court has not held that such fees must be awarded. *Farrar v. Hobby*, 506 U.S. 103 (1992).

Certainly, nothing in these cases requires this Court to conclude that the element of actual chill is merely a means of proving damages. But the holdings in the cases recited herein suggest that this Court has long recognized the intrinsic value of proving the breach of a Constitutional right. Thus, where force is used and no damage can be proved, a plaintiff is entitled to nominal damages, and potentially to punitive damages and attorney's fees. Where a plaintiff proves that he was unlawfully seized, a plaintiff is entitled to nominal damages, and may be awarded both punitive damages and attorney's fees.

CONCLUSION

The petitioners request that this Court grant the writ of certiorari requested here and permit the parties to brief this fully so that this Court may resolve an apparent split among the circuits on the standard necessary to support a claim for a chill to a person's First Amendment rights.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of November two thousand and two.

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. James L. Oakes,
Hon. Roger J. Miner,
Circuit Judges.

Lauren Anzalone and James Purcell,

Plaintiffs-Appellants,

-v.- Nos. 01-9367

Raymond O'Connell, (Filed Nov. 26, 2002)

Defendant-Appellee.

APPEARING FOR APPELLANT:

Norman A. Pattis, Esq.,
Williams & Pattis, New
Haven, Connecticut

APPEARING FOR APPELLEES:

Richard J. Buturla, Esq.,
Berchem, Moses & Devlin
P.C., Milford, Connecticut

Appeal from the United States District Court for the District of Connecticut (Janet C. Hall, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is **AFFIRMED**.

Plaintiffs-appellants Lauren Anzalone and James Purcell appeal from the decision of the district court (Janet C. Hall, *Judge*) granting summary judgment in favor of defendant-appellee, Raymond O'Connell, the Superintendent of the Stratford Board of Education, and dismissing their claim that defendant's threat to file a libel action against them for allegedly defamatory statements violated their rights to free speech. We affirm.

This case arose out of the same sequence of events, and involved the same defendant, as another appeal recently decided by a panel of this Court. *See Colombo v. O'Connell,* No. 02-7170, 2002 WL 31444517 (2d Cir. Nov. 4, 2002). In a *per curiam* order, the *Colombo* panel affirmed the district court's order dismissing plaintiff Colombo's complaint, on the basis that she had failed to demonstrate that defendant's threat to file a libel action had an "actual" chilling effect on her right to free speech. *See id.* at *2 (citing *Spear v. Town of W. Hartford,* 954 F.2d 63 (2d Cir. 1992)). Because the instant case involves identical factual

circumstances, identical applicable law, and nearly identical parties, we affirm for essentially the same reasons stated by the *Colombo* panel.

Accordingly, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
Roseann B. MacKechmie, Clerk

By: /s/ Lucille Carr

Date: 11/26/02

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LAUREN ANZALONE and JAMES PURCELL, Plaintiff,	:	CIVIL ACTION NO. 3:00-CV-1754 (JCH) (Filed Oct. 3, 2001)
v.	:	
RAYMOND O'CONNELL Defendant.	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 13]

In this case, plaintiffs' Lauren Anzalone ("Anzalone") and James Purcell ("Purcell") claim defendant Raymond O'Connell ("O'Connell") threatened them with a lawsuit in violation of their First Amendment rights to free speech after plaintiffs filed a petition for a recall vote of the Town of Stratford Board of Education. Plaintiffs also allege state pendent claims for intentional and negligent infliction of emotional distress. In his motion for summary judgment, O'Connell argues that no genuine issue of material fact exists as to whether defendant chilled plaintiffs' exercise of their First Amendment rights, whether defendant acted under color of law, and whether defendant is entitled to qualified immunity.

I. BACKGROUND

On August 1, 2000, plaintiffs and another individual filed a petition with the Town of Stratford Clerk requesting a recall election for the members of the Stratford Board of Education. The body of the petition alleged the

Board concealed "illegal and unethical behavior on the part[ ] of the Superintendent." Def.'s Mem. of Law in Supp. of Mot. for Summ. J., Ex. A. O'Connell, the Superintendent of Schools for the Town of Stratford, asked a private attorney to notify the petition's signatories that the allegations were libelous and threaten a legal action if the petition was not retracted. *Id.* at Ex. B. Plaintiff Anzalone testified in her deposition that she did not guard her opinion of the Superintendent in response to O'Connell's letter threatening legal action. Anzalone Dep. at 16-18, 20-22. Plaintiff Purcell testified in his deposition that he had not made any comments about O'Connell since receiving the letter, but noted that the letter did not change how he would have handled himself if asked questions. Purcell Dep. at 14-15. Both plaintiffs testified that none of the signatories retracted their petition. *Id.* at 14; Anzalone Dep. at 19.

II. DISCUSSION

Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 107 (2nd Cir. 2000). The burden of showing that no genuine factual dispute exists rests upon the moving party. *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 133 (2d Cir. 2000) (citing *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994)). In assessing the record to determine if such issues do exist, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Heilweil v. Mount Sinai Hosp.*, 32

F.3d 718, 721 (2d Cir. 1994). When reasonable persons, applying the proper legal standards, could differ in their responses to the questions raised on the basis of the evidence presented, the question is best left to the jury. *Sologub v. City of New York,* 202 F.3d 175, 178 (2d Cir. 2000).

To sustain their cause of action under § 1983, the plaintiffs must present facts that indicate a deprivation of constitutional rights. *Spear v. Town of W. Hartford,* 954 F.2d 63, 67 (2d Cir. 1992). The First Amendment protects individuals' right to free speech and extends so far as to prohibit state action that merely chills speech. But, at the very lest, the plaintiff must present evidence that the defendant's actions had an actual, non-speculative chilling effect on plaintiff's speech. *Id.* at 67-68 (holding that a lawsuit initiated by West Hartford and corresponding injunction as a basis for a First Amendment violation under § 1983 were insufficient to survive a 12(b)(6) motion where plaintiff did not allege that he changed his behavior at all in response); *cf. Mozzochi v. Borden,* 959 F.2d 1174, 1178-80 (2d Cir. 1992) (holding, in qualified immunity context, that no constitutional deprivation occurred where it was undisputed that the plaintiff's speech was not inhibited by town's filing and prosecution of criminal charges). The Second Circuit has even concluded that unsubstantiated allegations of chilled speech do not satisfy the injury-in-fact prong or standing. *Bordell v. Gen. Elec. Co.,* 922 F.2d 1057, 1060-61 (2d Cir. 1991) (holding insufficient for standing a subjective fear of prosecution and allegations of conduct forgone as grounds to establish chilling effect, where allegations are unsubstantiated and factual record presents evidence to the contrary).

In this case, both plaintiffs commented on the threatened litigations' effect on their behavior. Anzalone continues to voice her opinion on the underlying matter involving O'Connell and indicated that she has no intention of stopping. Anzalone Dep. at 19, 21-22. Purcell has not commented on the underlying matter to anyone since receiving the letter, but he did not claim that he had any opportunity to do so and stated plainly that his remarks would not be any different before and after the letter from O'Connell's counsel. Purcell Dep. at 14-15. Moreover, the plaintiffs readily admit that they have not retracted the statement that prompted the litigation threat. Anzalone Dep. at 19; Purcell Dep. at 14.

Plaintiffs in response point to one remark by Purcell that he had not made any comments about O'Connell since receiving the letter. Reviewing the statement in context, however, it is clear that Purcell's lack of commentary was unrelated to any chilling effect from the letter. When asked whether the letter changed anything he would have said or done given the opportunity, Purcell responded in the negative. These undisputed facts do not raise to the level of a deprivation of constitutional rights. Nothing in the complaint or evidence provided by the plaintiffs suggests any actual chilling effect on their speech. Therefore, O'Connell's letter did not deprive Anzalone or Purcell of their First Amendment rights, and they cannot maintain an action under § 1983.[1]

---

[1] Proof of a deprivation of constitutional right is the first prong for analyzing qualified immunity for state officials. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

Finally, the plaintiffs have alleged pendant state claims for intentional and negligent infliction of emotional distress. Under 28 U.S.C. § 1367(c)(3), "[t]he district courts may decline to exercise supplemental jurisdiction over a [state law] claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). While dismissal of the state claims is not absolutely mandatory, *Rosado v. Wyman*, 397 U.S. 397, 403-05 (1970); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988), the basis for retaining jurisdiction is weak when the federal claims are dismissed before trial. *United Mine Workers v. Gibbs*, 38 U.S. 715, 726 (1966). Accordingly, the court declines to exercise jurisdiction over the state law claims, and those claims are dismissed without prejudice.

For the foregoing reasons, O'Connell's Motion for Summary Judgment [Dkt. No. 13] is GRANTED, and the pendant state claims are dismissed. The Clerk is directed to close the case.[2]

SO ORDERED.

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[2] If the plaintiff cannot prove violation of a constitutional right, then the defendant official would be entitled to qualified immunity. Although qualified immunity would serve as alternative grounds for this ruling using the same analysis, the court does not reach the question because the plaintiffs have not proven they have a cause of action.

Dated at Bridgeport, Connecticut this 3rd day of October, 2001.

/s/ Janet C. Hall
Janet C. Hall
United States
District Judge